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# Supreme Court of the United States

October Term, 1974
No. 74-1563

THE CITY OF EASTLAKE, *et al.*,
*Petitioners,*
vs.
FOREST CITY ENTERPRISES, INC.,
*Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

## BRIEF FOR PETITIONERS

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## TABLE OF CONTENTS


OPINIONS BELOW ..... 1

STATEMENT OF JURISDICTION ..... 2

CONSTITUTIONAL AND CITY CHARTER PROVISIONS INVOLVED ..... 2

QUESTION PRESENTED ..... 3

STATEMENT OF THE CASE ..... 4

SUMMARY OF ARGUMENT ..... 6

ARGUMENT —

I. The Decision Below Relies Upon and Wrongly Interprets Decisions of This Court in *Washington v. Roberge*, 278 U.S. 116 (1928), *Eubank v. Richmond*, 226 U.S. 137 (1912) and *Cusack v. Chicago*, 242 U.S. 526 (1917) ..... 9

A. The Zoning Restrictions Imposed on Respondent's Property Are Reasonable ..... 11

B. Local Political Land Use Decisions Should Not Be Impeded or Prevented by a Court Unless Unreasonable or in Violation of Law 12

II. The Power to Change or Amend a Zoning Ordinance Is a Legislative Function Under the Substantive Law of Ohio and Subject to Referendum ..... 13

III. The Precedents Established in *James v. Valtierra*, 402 U.S. 137 (1971) Control in This Case 15

IV. The Exercise of Referendum Powers Reserved to the People Does Not Constitute Unconstitutional Delegation of Legislative Power ..... 19

V. Referendum Vote on Zoning Is Not an Innovative Concept in Ohio ..... 22

VI. The 55 Percent Voter Approval Requirement of Article VIII, Sec. 3 of the Eastlake Charter Does Not Affect Its Validity ..... 23

CONCLUSION ..... 24

## TABLE OF AUTHORITIES

### Cases

*Berg v. Struthers*, 176 Ohio St. 146 (1964) ..... 13
*City of Coral Gables v. Carmichael*, 256 So. 2d 404 (1972) ..... 13, 16
*City of Eastlake, et al. v. Forest City Enterprises, Inc.*, 41 Ohio St. 2d 187, 324 N.E.2d 740 (1975) ..... 1
*Cook-Johnson Realty Co. v. Bertolini*, 15 Ohio St. 2d 195, 200, 201 ..... 23
*Cusack v. Chicago*, 242 U.S. 526 (1917) ..... 9, 11
*Dillon v. Cleveland*, 117 Ohio St. 258 ..... 15
*Donnelly v. Fairview Park*, 13 Ohio St. 2d 1 (1968) .... 13
*Dwyer v. City Council of Berkeley*, 200 Cal. 505 (1927) 16
*Eubank v. City of Richmond*, 226 U.S. 137 (1912) ..6, 9, 10, 11
*Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) ....6, 11, 12
*Highland Farms Dairy v. Agnew*, 300 U.S. 608 ..... 12
*Hilltop Realty v. South Euclid*, 110 Ohio App. 535 (1960) ..... 13
*James v. Valtierra*, 402 U.S. 137 (1971) .....7, 15, 16, 17, 18
*Mobil Oil Corp. v. Rocky River*, 38 Ohio St. 2d 23, 31 (1974) ..... 13
*Myers v. Fortunato*, 12 Del. Ch. 374, 375 (1920) ..... 9
*Ranjol v. Lansing*, 417 F.2d 321, 324, *cert. den.* 397 U.S. 980 (1969) ..... 12



*Southern Alameda Spanish Speaking Organization v. City of Union City, Cal.*, 424 F.2d 291 (9th Cir. 1970) .....10, 11
*Spaulding v. Blair*, 403 F.2d 862 (4th Cir. 1968) ..... 10
*State ex rel. Bramblette v. Yordy*, 24 Ohio St. 2d 147, 150 (1970) ..... 15
*State ex rel. Snyder v. Bd. of Education*, 78 Ohio App. 194 (1946) ..... 15
*State ex rel. v. Hildebrant*, 94 Ohio St. 154, 161 (1916) 21
*Tuber v. Perkins*, 6 Ohio St. 2d 155 (1966) ..... 13
*Washington ex rel. Seattle Trust Co. v. Roberge*, 278 U.S. 116 (1928) .....6, 9, 10

### Constitutional and City Charter Provisions

Constitution of the United States, Fourteenth Amendment, Section 1 .....2, 5, 19
Constitution of the State of California, Article XXXIV .....15, 17, 18

Constitution of the State of Ohio:

Article I, Section 2 .....19, 20
Article II, Section 1 (1912) ..... 18
Article VII, Section 5 (1802) ..... 18
Article XVIII, Section 3 ..... 19
Article XVIII, Section 7 ..... 19
Article XVIII, Section 8 ..... 18
Schedule 17 (1851) ..... 18

Charter of the City of Eastlake:

Preamble ..... 19
Article III, Section 1 .....14, 20
Article V, Section 1, 1D ..... 20

Article VIII, Section 3 .....2, 4, 8, 17, 18, 20, 23, 24, 25
Article XI, Section 2 ..... 20
Article XI, Section 4 .....8, 20, 24

**Statutes**

Ohio Revised Code:

Section 133.16 ..... 24
Section 139.02 ..... 24
Section 303.11 ..... 22
Section 303.12 ..... 22
Section 519.11 ..... 22
Section 731.41 ..... 14
Section 519.12 .....22, 23
Section 1515.04 ..... 24
Section 5705.191 ..... 24

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## BRIEF FOR PETITIONERS

## OPINIONS BELOW

The Opinion of the Supreme Court of Ohio is reported at 41 Ohio St. 2d 187, 324 N.E.2d 740 and is printed in the Appendix to the Petition for Certiorari, at page 13. The Opinions of the Eleventh District Court of Appeals of Lake County and the Court of Common Pleas, which are not reported, are printed in the Single Appendix at pages 23 and 19 respectively.

## STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Ohio was entered on March 19, 1975. A timely filed Petition for Re-hearing was denied on April 17, 1975. The Petition for Certiorari was filed on June 12, 1975, and granted on October 14, 1975. Jurisdiction to review the judgment by Writ of Certiorari is conferred on this Court by Title 28, United States Code, Section 1257(3).

## CONSTITUTIONAL AND CITY CHARTER PROVISIONS INVOLVED

**United States Constitution, Fourteenth Amendment:**

"§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

**Charter of the City of Eastlake:**

Article VIII—Section 3 of the Charter of the City of Eastlake provides in pertinent part, "That any change to the existing land uses * * * cannot be approved unless and until it shall have been submitted to the Planning Commission, for approval or disapproval. That in the event the City Council should approve any of the preceding changes, or enactments, whether approved or disapproved by the Planning Commission it shall not be approved or passed by the declaration of an emergency, and it shall not be effective, but it shall be mandatory that the same be approved by a 55% favorable vote of all votes cast of the qualified electors of the City of Eastlake at the next regular municipal election, if one shall occur not less than sixty (60) or more than one hundred and twenty (120) days after its passage, otherwise at a special election falling on the generally established day of the primary election. Said issue shall be submitted to the electors of the City only after approval of a change of an existing land use by the Council for an application, and * * *."[1]



## QUESTION PRESENTED

Whether the automatic and mandatory referendum voting procedure provided for by the Eastlake City Charter, requiring that any ordinance rezoning land use must first be approved by a 55% majority of the voters in a city-wide election at a general or special election prior to becoming finally effective, is in violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

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1. For full text of pertinent Eastlake Charter provisions, see (A. 30); for full text of Charter Amendment, see (A. 69).

NOTE: "A." refers to the page number of items reprinted in the Single Appendix. "Pet." refers to page numbers of the opinion of the Ohio Supreme Court which is appended to the Petition for Writ of Certiorari.

## STATEMENT OF THE CASE

### A. Factual Background

On May 8, 1971, Respondent, Forest City Enterprises, Inc., an Ohio Corporation, applied to the City of Eastlake for rezoning of an eight (8) acre parcel of land from industrial to multi-family high rise use classification.

The application of respondent was processed and approved by the City Planning Commission and on December 28, 1971, the Council of the City of Eastlake enacted Ordinance No. 1971-168, which provided for the requested change in zoning classification for the property in question.

In the interim, an amendment to the Eastlake City Charter was proposed by initiative petition, which provided that no ordinance providing for change in land use in the City of Eastlake would become finally effective unless and until approved by a 55% majority vote in a city-wide referendum election, which amendment was adopted at a general election on November 2, 1971.

Thereafter, in May, 1972, an election was held and the Ordinance providing for the rezoning of respondent's property failed to obtain the requisite 55% affirmative majority of the votes cast.

### B. Proceedings Below

Respondent then filed for declaratory judgment and injunctive relief in the Court of Common Pleas of Lake County, Ohio, claiming the mandatory referendum voting procedure required by Article VIII, Section 3 of the Charter of the City of Eastlake, in respect to land change use, was unconstitutional as it denied respondent due process of



law under the Ohio and United States Constitution, and violated the referendum provisions of the Ohio Constitution.

The case was submitted to the trial court upon the complaint and answer, with stipulations of counsel as to the applicability of certain ordinances of the City of Eastlake and the Eastlake Charter.[2] No evidence was introduced by either side.

The decision of the Court of Common Pleas (A. 19), which found the mandatory referendum voting provisions of the Eastlake Charter in respect to land use change did not violate respondent's constitutional rights, was later sustained by the Eleventh Appellate District Court of Appeals of Lake County, Ohio (A. 23).

Thereafter, respondent perfected appeal to the Supreme Court of Ohio, and the majority of the Court[3] in its Decision of reversal, found that a reasonable use of property by rezoning may not be made dependent upon the potentially arbitrary and unreasonable whims of the voting public, without violating due process of law under the Federal Constitution (Pet. 23, 24).

On October 14, 1975, this Court granted petitioners' Writ for Certiorari to review the Decision of the Ohio Court below to determine the question presented, to wit:

> Whether the mandatory referendum voting procedure of the Eastlake Charter, for rezoning land use, constitutes an unlawful delegation of legislative power to the electorate in violation of the Fourteenth Amendment to the United States Constitution.

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2. See transcript of Proceedings (A. 15-18).

3. Five Justices joined in the majority Opinion (Pet. 13); four joined in the concurrence (Pet. 27) and two joined in the dissent (Pet. 30).

## SUMMARY OF ARGUMENT

### I

The Decision of the Ohio Supreme Court below, that the referendum voting procedure for rezoning provided for by the Eastlake Charter, constitutes unlawful delegation of legislative power and violates due process of law under the Federal Constitution, relied upon and wrongfully interprets decisions of this Court in *Washington v. Roberge*, 278 U.S. 116 (1928), *Eubank v. Richmond*, 226 U.S. 137 (1912), and *Cusack v. Chicago*, 242 U.S. 526 (1917). The procedural standards and safeguards to which reference is made in those cases have no application where submission of the issue is made by referendum to the electorate as a whole. Such mandatory referendum procedure does not constitute an arbitrary or unreasonable exercise of the police power and is a valid means whereby the voters themselves may exercise their traditional right to override the views of their elected representatives as to what best serves the public interest and give the electorate a voice in decisions that will affect the future development of their own community.

### II

The zoning restrictions placed upon respondents' property were not claimed or found to be unreasonable. The procedures by which land use restrictions are sought to be imposed in the first instance are political in nature and entrusted to local control under the political powers and the final decision, if reasonable, does not take property without due process of law. *Euclid v. Ambler Realty Co.* 272 U.S. 365 (1926).



### III

The rezoning of respondents' property, under the substantive law of the State of Ohio, is a legislative function and, as such, subject to the referendum process. The mandatory zoning referendum procedure provided for by the Eastlake Charter is not in conflict with the referendum provisions of the Ohio Constitution or general laws.

### IV

The precedents of this Court established in *James v. Valtierra*, 402 U.S. 137 (1971) control in the instant case. In each case, the approval or disapproval of multi-family housing by the electorate of a community as a whole, is a condition to passage of enabling legislation. The mandatory referendum procedure in each instance was the same.

Like arguments were made in each case that the California Constitutional provision and the Eastlake Charter provision, though seemingly neutral on their face, were in fact aimed at discrimination against racial and economic minorities. This Court in *Valtierra*, after focusing on the history of California, as to the use of referendums, which is equally applicable to Ohio, found such provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice, and such procedure for democratic decision making by the electorate does not violate the Federal Constitution.

### V

Referendum powers are reserved to the people under the Ohio Constitution and in furtherance of such powers, the people of City of Eastlake, by express charter provisions, have reserved unto themselves, the right of refer-

endum over the legislative acts of their elected counsel. The finding of the Court below that the referendum procedure provided for by the Eastlake Charter for changing land use constitutes unlawful delegation of legislative power to the people is in contravention of the express provisions of the Ohio Constitution.

**VI**

Submission of zoning decisions to electors by referendum, both mandatory and by petition, is not an innovative concept in Ohio. No meaningful distinction may be made between the constitutionality of referendum zoning procedure in rural townships and counties from that in urban municipal communities as the Ohio Supreme Court has done by its decision in the present case.

**VII**

The 55% voter approval requirement of Article VIII, Section 3 of the Eastlake Charter does not stand as an impediment to its validity as other similar restrictive requirements are found in Ohio law. Article XI, Section 4 of the Eastlake Charter, a saving clause, would apply in the event the Court found any section or part of Amended Article VIII, Section 3 of the Eastlake Charter to be invalid for any reason.



## ARGUMENT

### I. THE DECISION BELOW RELIES UPON AND WRONGLY INTERPRETS DECISIONS OF THIS COURT IN WASHINGTON v. ROBERGE, 278 U.S. 116 (1928), EUBANK v. RICHMOND, 226 U.S. 137 (1912) AND CUSACK v. CHICAGO, 242 U.S. 526 (1917).

The Ohio Supreme Court below reversed the decisions of the trial court and the Court of Appeals based upon its analysis of decisions of this Court in *Washington, ex rel. Seattle Trust Co. v. Roberge*, 278 U.S. 116 (1928) and *Eubank v. City of Richmond*, 226 U.S. 137 (1912) and distinction of *Thomas Cusack Co. v. Chicago*, 242 U.S. 526 (1917). The resultant holding of the Court that a reasonable use of property, made possible by appropriate legislative action, may not be made dependent upon the potentially arbitrary and unreasonable whims of the voting public (Pet. 23),[4] misinterprets such decision of this Court.

In *Eubank*, where building line restrictions were sought to be imposed by neighborhood preference, it was held the exercise of such power could not be delegated to the potentially arbitrary discretion of the narrow interests of any segment of the public. This concept was further advanced in *Roberge* where a requested zoning change for a philanthropic home was subjected to the consent of the owners of the property within 400 feet of the subject property. Such delegation was deemed unlawful as denial of due process.

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4. The Delaware case of *Myers v. Fortunato*, 12 Del. Ch. 374, 375 (1920) cited by The Ohio Supreme Court does not support the conclusion of the Court on its facts as the *Myers* case, similar to *Cusack*, required a consent vote of adjoining property owners, not the electorate as a whole.

The foregoing decisions are distinguishable from the instant case where the referendum ordinance is submitted to the electorate as a whole. Reliance was made on the same cases in *Southern Alameda Spanish Speaking Organization v. Union City* (9th Cir. 1970) 424 F.2d 291, where a city-wide referendum nullifying a zoning ordinance to rezone certain property was upheld.

There, as in the instant case, the contention was made that the referendum process destroys the necessary procedural safeguards upon which a municipality's power to zone is based and subjects zoning decisions to the bias, caprice, and self interest of the voters.

In rejecting such contention, the Court in *Alameda* found reliance on *Roberge* and *Eubank* to be misplaced as the procedural safeguards, to which reference is made in those cases, have no application where the voting is submitted to the electorate as a whole.

In finding the referendum zoning process did not violate due process requirements, the Court in *Alameda* stated:

> "A referendum, however, is far more than an expression of an ambiguously founded neighborhood preference. It is the city itself legislating through its voters—an exercise by the voters of their traditional right through direct legislation to override the views of their elected representatives as to what serves the public interest. See *Spaulding v. Blair,* 403 F. 2d 862 (4th Cir. 1968)
>
> "Nor can it be said that the resulting legislation on its face was so unrelated to acceptable public interest standards as to constitute an arbitrary or unreasonable exercise of the police power." See *Washington, ex rel. Seattle Trust Co. v. Roberge, supra; Eubank v. Richmond, supra; Euclid v. Ambler Realty Co.,* 272 U.S. 365, 395, 47 S. Ct. 114, 71 L. Ed. 303 (1926)
>
> * * *
>
> "Thus in the present case, neither the zoning process itself nor the result can be said to be such an arbitrary or unreasonable exercise of the zoning power as to be violative of appellant's right to due process of law * * *" (Cited in the Eastlake minority opinion at Pet. 34, 35.)



**A. The Zoning Restrictions Imposed on Respondent's Property Are Reasonable.**

The Court below further relied upon *Thomas Cusack Co. v. Chicago,* 242 U.S. 526 (1917) for its finding that a *reasonable use* of property, made possible by appropriate legislative action, may not be made dependent upon the potentially arbitrary and unreasonable whims of the voting public. In *Cusack* in which a majority of property owners' consent was required for erection of billboards in a residential area, this Court specifically looked to the reasonableness of the use proposed and held the consent ordinance to be constitutional.

In the instant case, respondent did not claim, and the Court below did not determine,[5] that the land use restrictions, as applied to respondent's particular property, were in any manner unreasonable. Nor could respondent so claim as the restrictions imposed upon respondent's property were the same from the time of enactment of the original Eastlake comprehensive zoning plan to the present and the ownership of such property by respondent was with

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5. The Ohio Supreme Court, in its majority Opinion, stated: "Whether the zoning of Appellant's property for industrial use is reasonable * * * we do not decide." (Pet. 26)

full knowledge of the zoning restrictions so imposed. Respondent can now only complain that it is being denied an economic advantage, to which it claims to be entitled, by virtue of failure of the requested rezoning to survive a referendum vote of the community.

### B. Local Political Land Use Decisions Should Not Be Impeded or Prevented by a Court Unless Unreasonable or in Violation of Law.

Land use decisions, in the first instance, are political in nature and entrusted to local control under the political powers and if reasonable, do not take property without due process of law. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). As further decided in *Ambler Realty*, it is only after the final political decision has been made[6] (be it by municipal council or final referendum vote of the electorate) and the restrictions imposed are unreasonable, arbitrary, or confiscatory, that a court challenge may be made on a specific fact basis in each case.

The legislative process established by the Eastlake Charter was the means by which the City of Eastlake elected to make its political decision in the first instance as to whether respondent's property would be rezoned to the requested high-rise use classification. Such decision, and the procedure by which it is made, is of purely local concern[7] and should not be impeded or prevented by a

6. The decision below places in jeopardy the right and power of the people to decide *before* the fact on important legislative decisions of social and economic concern to the community as a whole.

7. The sovereignty of a state rests in its people. The manner in which they distribute or parcel out its exercise is not a federal justiciable question. *Highland Farms Dairy v. Agnew*, 300 U.S. 608. Referendum, which is part of the state's legislative process, being founded on neutral principles, should be exempt from Federal Constitutional restraints. *Ranjol v. Lansing*, 417 F.2d 321, 324, *cert. den.* 397 U.S. 980 (1969).



Court except where it is made to appear that such final local decision is unreasonable or in violation of the law.

> "Referendum procedure provided by city charter, being an exercise of legislative power by the electors, should not be impeded or prevented by a court except where it is made to appear that the proceeding is inapplicable under the law or is in violation of the law." *City of Coral Gables v. Carmichael*, Fla., 256 So. 2d 404. Headnote 7.

The final political decision of the City of Eastlake in respect to rezoning of respondent's property through its mandatory referendum procedure, as provided by the City Charter, was not demonstrated to be unreasonable or in violation of law.

## II. THE POWER TO CHANGE OR AMEND A ZONING ORDINANCE IS A LEGISLATIVE FUNCTION UNDER THE SUBSTANTIVE LAW OF OHIO AND SUBJECT TO REFERENDUM.

As stated by the Ohio Supreme Court in its majority decision,[8] in Ohio, the power to zone or rezone, via the passage or amendment of a comprehensive zoning ordinance, is clearly a legislative function and, as such, subject to the referendum process.

8. "In Ohio, the power to zone or rezone, via the passage or amendment of a comprehensive zoning ordinance, is clearly a legislative function. *Berg v. Struthers*, 176 Ohio St. 146 (1964); *Tuber v. Perkins*, 6 Ohio St. 2d 155 (1966); *Donnelly v. Fairview Park*, 13 Ohio St. 2d 1 (1968); see also Justice Corrigan's concurrence in *Mobil Oil Corp. v. Rocky River*, 38 Ohio St. 2d 23, 31 (1974). As such, the zoning or rezoning of property is subject to the referendum process. *Hilltop Realty v. South Euclid*, 110 Ohio App. 535 (1960)" (Pet. 16).

Article III, Section 1 of the Eastlake Charter[9] provides that all ordinances and other measures adopted by the City Council shall be subject to referendum to the extent and in the manner provided by Charter or the Laws of Ohio.

No contention has been made by respondent that the requested rezoning of its property from industrial to multi-family high-rise use is other than a legislative act and as such, subject to referendum under the laws of the State of Ohio. Actually, respondent's very narrow claim, throughout these proceedings, is entitlement to a procedure whereby the electorate circulate a referendum petition for signature by 10% of the electorate, and that without such procedural safeguard there is no due process of law.[10] It is the automatic and mandatory referendum procedure provided by the Eastlake Charter to which respondent objects.

While the general laws of the State of Ohio provide for a general referendum procedure based upon a 10% petition basis, the Ohio Revised Code, Section 731.41,[11] specifically provides that such procedure does not apply to a municipality which adopts its own charter containing an initiative and referendum provision.

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9. "Ordinances and other measures may be proposed by initiative petition and adopted by elections, and other measures adopted by the council shall be subject to referendum, to the extent and in the manner now or hereafter provided by the Charter or the laws of Ohio." Eastlake Charter, Article III, Section 1 (A. 35).

10. As stated by the Ohio Supreme Court below: "Rather, (Respondent) Appellant's narrow claim is that Eastlake's Charter provisions constitutes delegation of legislative power to the people and *as such* violates the requirement that the police powers be exercised in a reasonable and unarbitrary fashion" (Pet. 18).

11. Ohio Revised Code Section 731.41: "Sections 731.29 to 731.41, inclusive of the Revised Code do not apply to any municipal corporation which adopts its own charter containing an initiative and referendum provision for its own ordinances and other legislative measures."



The Ohio Supreme Court has also determined that a municipal charter is not restricted to the same provisions for referendum as enacted by the General Assembly.

> "In providing for referendum, however, a municipal charter is not restricted to the adoption of the same provisions enacted by the General Assembly. It may be less restrictive as to use of the referendum, as was the Charter of the city of Toledo which authorized referendum on all ordinances, including one levying a tax passed as an emergency measure. *State ex rel. Snyder v. Bd. of Education* (1946), 78 Ohio App. 194. It may be more restrictive, as in *Dillon v. Cleveland*, supra (117 Ohio St. 258), where a referendum would have been required under state law, but was not required under the provisions of the Charter of the city of Cleveland." (*State ex rel. Bramblette v. Yordy* (1970), 24 Ohio St. 2d 147, 150.)

It is clear from an analysis of the substantive and procedural law of Ohio that the mandatory zoning referendum procedure provided for by the Eastlake Charter was not in conflict with referendum provisions of the Ohio Constitution as contended by respondent; nor did the court below so find.

## III. THE PRECEDENTS ESTABLISHED IN JAMES v. VALTIERRA, 402 U.S. 137 (1971) CONTROL IN THIS CASE.

At issue in *James v. Valtierra*, 402 U.S. 137 (1971) was the constitutionality of Article 34 of the California Constitution which provided for a mandatory referendum of approval prior to construction of any low rent housing project in any community. The mandatory referendum

requirement of the California Constitution was upheld by this Court[12] as an appropriate exercise of democratic decision making.

The majority of the Court below distinguished *Valtierra* on the assertion the California case did not concern zoning, rather approval or disapproval of low rent housing, and involved a decision which may lead to large expenditure of local government funds for increased public services and to lower tax revenues. No such meaningful distinction may be made from *Valtierra* as the change sought in the present case—multi-family high-rise—would have much the same effect as low-rent public housing and consequently the interest of the community as a whole may be equally at issue. The expenditure of public funds and tax results may be the same in either instance.

The referendum procedures required by the California Constitution and the Eastlake Charter are nearly parallel as applied to any given community. In each case, mandatory referendum voter approval is required as a condition to the enabling legislation becoming finally effective.

In the *Valtierra* case, as in the present case, like arguments were advanced that the automatic referendum procedure was unconstitutional as such procedure demands a mandatory referendum while many other referendums only take place upon citizen initiative. In rejecting such contention, Justice Black, in the majority Opinion stated:

> "This procedure ensures that all the people of a community will have a voice in a decision which may lead

12. Other lower courts have applied the principles set forth in *Valtierra* to referendums amending comprehensive zoning ordinances. See *Dwyer v. City Council of Berkeley*, 200 Cal. 505 and *City of Coral Gables v. Carmichael*, 256 So. 2d 404.



> to large expenditures of local governmental funds for increased public services and to lower tax revenues. It gives them a voice in decisions that will affect the future development of their own community. This procedure for democratic decision making does not violate that no state shall deny to any person 'the equal protection of the laws.'" (*James v. Valtierra, supra.*)

In further conformity with the *Valtierra* case, where this Court found that California's Article XXXIV did not rest upon "distinctions based on race", it cannot be said that Article VIII, Section 3, of the Eastlake Charter is discriminatory. Respondent made no challenge,[13] and there is no record to indicate, that the Eastlake Charter provision, neutral on its face, discriminates against racial or economic minorities.[14]

While Justice Stern, in his concurring Opinion in the present case, found the procedure established by the Eastlake Charter to have but a single motive, "and that is to exclude, to build walls against the ills, poverty, racial strife, and the people themselves, of our urban areas" (Pet. 29), such finding is not supported by the pleadings or the record in this case.

Certainly the history of Ohio demonstrates devotion to the use of referendums to give citizens a voice on ques-

13. Respondent, in its initial brief in the Court of Common Pleas, stated that it does not challenge the Eastlake Charter provision on any basis dealing with discrimination, intent, effect, or express provision against racial or economic minorities. Thereafter, racial or economic discrimination was not briefed by Petitioners or Respondent as an issue in the case.

14. Claim of discrimination and that the Eastlake Charter provision interfered with "National Housing policies" and "Constitutional rights of travel" were brought into the case for the first time in an Amicus Curiae Brief filed by "Lawyers for Housing" in the Ohio Supreme Court.

tions of public policy equal to that of California and of equal occurrence in the State's political life.[15] Equally applicable to the Eastlake Charter is the finding of the court in the *Valtierra* case that:

> "Provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice."

No meaningful distinctions may be made between the subject matter and procedures required by Article XXXIV of the California Constitution and Article VIII, Section 3, of the Eastlake Charter. Equally applicable in each case is the finding of this court set forth in Headnote 4(2) of *Valtierra*

> "the referendum is a democratic decision-making procedure which, by insuring that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues, gives them a voice in decisions that will affect the future development of their community."

The principles established by the court in *Valtierra* are fully applicable and control in the instant case.

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15. Ohio legislatures and courts have long approved referendums and referendum type procedures which readily fulfill the standards of *Valtierra*.

Under the 1802 Ohio Constitution, the calling of a constitutional convention to make amendments required a majority of the popular vote (Ohio Constitution Article VII, Section 5 (1892)); the 1851 Ohio Constitution was adopted by referendum, and any Ohio Constitutional Amendments must be approved by public vote (Ohio Constitution Schedule 17 (1851)); and in 1912 adopted the initiative and referendum provision (Ohio Constitution Article II, Section 1 (1912)). In addition any proposal to alter Ohio County boundary lines *must* receive referendum approval (Ohio Constitution, Article XVIII, Section 8) and the creation of a municipal charter commission or the adoption of a charter both require referendum approval by the electors of the municipality (Ohio Constitution, Article XVIII, Section 8).



## IV. THE EXERCISE OF REFERENDUM POWERS RESERVED TO THE PEOPLE DOES NOT CONSTITUTE UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER.

The Court below in its finding that the referendum procedure of the Eastlake Charter for changing land use "constitutes unlawful delegation of legislative power in violation of the due process clause of the Fourteenth Amendment to the United States Constitution" is in apparent contravention of the express language of the Ohio Constitution.

Article I, Section 2 of the Ohio Constitution, states:

> "All political power is inherent in the people, government is instituted for their equal protection and benefit". Article II, Section 1f further provides: "The initiative and referendum powers are hereby *reserved* to the people of each municipality * * *" (Emphasis supplied)

Eastlake adopted a charter under Article XVIII of the Ohio Constitution, specifically Section 3, which provides: "Municipalities shall have authority to exercise all powers of local self-government" and Section 7, which provides for adoption of a city charter and to "exercise thereunder all powers of local self-government."

The Charter of the City of Eastlake, in conformity with Ohio Constitutional provisions, retained all powers of local self-government[16] except as limited by the Char-

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16. "We the people of the City of Eastlake * * * do hereby adopt this Charter for the government of the City of Eastlake in order to secure the benefits of municipal home rule and to exercise all the powers of local self government under the Constitution and the Laws of the State of Ohio." Article I, Preamble (A. 32, 33). "The municipality shall have all the powers of local self-government now or hereafter granted to the municipalities by the Constitution of the State of Ohio * * * and all such powers shall be exercised in the manner prescribed by this Charter * * *" Article I, Section 2 (A. 33).

ter, were vested in council,[17] (Article V, Section 1), and further provided that ordinances and other measures adopted by the City Council "shall be subject to referendum[18]. It is of significance to note that zoning ordinances passed by the Eastlake Council, even under the original City Charter provisions, were never exempted from referendum. The only change by the Charter amendment was the referendum procedure by which the zoning issue would be submitted to a vote of the electorate.[19]

It is difficult to reconcile the finding of the Ohio Supreme Court that there was unconstitutional *delegation* of legislative power from council to the voting public where such power was reserved to the people in the first instance. The referendum powers are inherent in the people under the Ohio Constitution[20] and in furtherance of such powers,

17. "All the legislative powers of the City of Eastlake, *except as limited by the Charter and the Constitution of Ohio,* shall be vested in a Council of seven (7) members * * *" Article V, Section 1 (A. 40) (emphasis supplied). "All legislative action, shall be by ordinance or resolution * * *" Article V, Section 1D (A. 40).

18. "* * * Ordinances and other measures adopted by council *shall be subject to referendum in the manner now or hereafter provided by this Charter* or the laws of Ohio" (emphasis supplied) Article III, Section 1 (A. 35).

"All general laws of the State of Ohio * * * which are not in conflict with this Charter as now enacted or hereafter amended * * * shall apply to the government of the municipality * * *" (emphasis supplied) Article XI, Section 2 (A. 62).

19. "That any change to existing land use * * * or the enactment of any ordinance * * * controlling the development of land * * * shall not be effective, but it shall be mandatory that the same be approved by a 55% favorable vote cast at the next regular municipal election, * * * otherwise at a special election * * *. Said issue shall be submitted to the electors of the City only after approval of a change in existing land use by the Council * * *" Amended Article VIII, Section 3 (A. 69).

20. "§1f [Power of municipalities.]

The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law."



the people of the City of Eastlake, by express charter provisions, have reserved the right of referendum over all ordinances adopted by its council.

Of equal application is the reasoning of the Ohio Supreme Court in *State ex rel. v. Hildebrant,* 94 Ohio St. 154, 161 (1916), in which an apportionment and redistricting act was annulled by referendum under the Ohio Constitution. In analyzing the sections of the Ohio Constitution which grant legislative power to the State Senate and House of Representatives, the Court states:

> "* * * the people of Ohio have by the aforesaid provisions of their constitution determined the manner by which such legislative power may be exercised, under what circumstances the laws passed by it may become operative without an appeal to the people, and have further imposed the conditions under which such laws may become operative or inoperative as they may have been adopted or rejected by the popular vote designated as the 'referendum' ".
>
> "* * * The legislative power is the supreme authority except as limited by the constitution of the state, and the sovereignty of the people is exercised through their representatives in the legislature unless by the fundamental law power is elsewhere reposed." (*State ex rel. Hildebrant, supra*)

The power of the people, acting within their constitutional rights, being supreme to the legislative acts of the council elected by the people, have the power to restrict the decision making power of the council in a way to share it with the voters of the local public entity.

It cannot be said that the exercise of such reserved powers by the voters of the City of Eastlake by mandatory referendum in rezoning of land constituted unconstitutional delegation of legislative power as determined by the Court below.

## V. REFERENDUM VOTE ON ZONING IS NOT AN INNOVATIVE CONCEPT IN OHIO.

Submission of zoning resolutions to electors by referendum, both mandatory and by petition, is not an innovative concept in the State of Ohio. Ohio Revised Code Sections 303.11[21] and 519.11 provide for submissions of zoning regulations adopted by County Commissioners and Township Trustees to the electors residing in the unincorporated areas of the county or township included in the proposed plan of zoning for their approval or rejection. In each instance, the zoning regulations became effective only if a majority of votes cast on the issue is in favor of the proposed plan.

Ohio Revised Code Sections 303.12[22] and 519.12[23] provide for referendum vote on amendments or supplements to county and township zoning resolutions.

The Ohio Supreme Court, in deciding as to the constitutionality of Ohio Revised Code Section 519.12, stated:

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21. "If the zoning resolution is adopted by the board of county commissioners, such board shall cause the question of whether or not the proposed plan of zoning shall be put into effect to be submitted to the electors residing in the unincorporated area of the county included in the proposed plan of zoning for their approval or rejection at the next primary or general election, or a special election may be called for this purpose." (Ohio Revised Code Sec. 303.11).

22. "Amendments * * * may be made * * * without submitting them to a vote of the electors unless within 30 days after the adoption of the amendment * * * there is presented to the board of county commissioners a petition signed by a number of qualified voters and equal to not less than eight percent of the total vote cast * * * requesting the board to submit the amendment * * * for approval or rejection at the next primary or general election * * *" (Ohio Revised Code Sec. 303.12).

23. Similar wording is found in Ohio Revised Code Sections 519.11 and 519.12 for adoption and amendment of a zoning code by township trustees in unincorporated areas of townships.



> "What the General Assembly has done in Section 519.12, Revised Code, is to provide the people of the several townships with a power to veto, by use of the device of referendum, zoning resolutions passed by township trustees."
>
> "We find no constitutional impediments to a grant of legislative power by the General Assembly to township trustees to make zoning resolutions, nor for the General Assembly to reserve the power of referendum to the people who will be affected by such resolutions. Therefore, Section 519.12, Revised Code, insofar as it accomplishes these purposes of the General Assembly is constitutional." *Cook-Johnson Realty Co. v. Bertolini*, 15 Ohio St. 2d 195, 200, 201.

No meaningful distinction can be made between the rural voting community, where the constitutional validity of referendum voting on zoning amendments was upheld in counties and townships, from that in urban municipalities as the Ohio Supreme Court has done by its decision in the instant case. Such inconsistency is apparent on its face.

## VI. THE 55 PERCENT VOTER APPROVAL REQUIREMENT OF ARTICLE VIII, SECTION 3 OF THE CHARTER DOES NOT AFFECT ITS VALIDITY.

The contention of respondent that the Eastlake Charter requirement of a 55 percent voter approval, instead of a bare majority, affected the constitutional validity of the referendum procedure was not commented on by the Ohio Supreme Court below, in its majority Opinion. The minority of the Court, however, found other similar restrictive

requirements in Ohio substantive law,[24] and determined, in their Opinion, that such 55 percent voter requirement does not stand as an impediment to the constitutional validity of the referendum procedure established by the Eastlake Charter.

Even if this Court should find the 55 percent voter requirement of Article VIII, Section 3 of the Eastlake Charter to be unreasonable for any reason then such determination should not impair the validity of the remainder as provided by Article XI, Section 4 of the Eastlake Charter.[25]

## CONCLUSION

The issue in this case transcends zoning. The assault on the referendum process provided for by the Eastlake Charter is a manifestation of a new distrust of democracy and democratic processes, contemptuous of the wisdom and fairness of the ordinary voter who, it is claimed, might impose unreasonable restrictions on respondent's property.

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24. The fact that the charter section in question requires "55% favorable vote of all votes cast" does not, in my opinion, stand as an impediment to the constitutional validity of the referendum procedure established by the charter. Similar restrictive election requirements can be found in the statutes, e.g., R. C. 139.02 (for issuance of federal aid bonds); R. C. 133.16 (for issuance of bonds for reconstruction of bridges); R. C. 1515.04 (creation of soil and water conservation district); and R. C. 5705.191 (approval of excess tax levy). (Eastlake minority opinion (Pet. 37)).

NOTE: R. C. 133.16 requires 60% voter approval if submitted at a special election; R. C. 139.02 requires 65% voter approval; R. C. 1515.04 requires 65% voter approval; R. C. 5705.191 requires 55% voter approval if submitted at a special election.

25. "The determination that any section or part thereof of this Charter is invalid, shall not invalidate nor impair the force or effect of any other section or part thereof * * *" Eastlake Charter, Article XI, Section 4 (A. 63).



This distrust is disturbing as it seizes on the "due process clause" to denounce a neutral and traditional democratic process itself as being prohibited by the Federal Constitution.

The judgment of the State Court below places in jeopardy the democratic process whereby the electors reserve unto themselves the right of veto of the legislative acts of their elected officials as to land use changes by which the future development of their City will be determined and, in effect, substitutes the decision of the courts for the decision of the voters in determining what are to the best social and economic interests of the community as a whole.

Accordingly, petitioners pray that this Court reverse the judgment of the Ohio Supreme Court and affirm the decisions of the Court of Appeals and the Court of Common Pleas which sustained the constitutional validity of the Mandatory referendum provision of Section 3, Article VIII of the Charter of the City of Eastlake.

Respectfully submitted,

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